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ALEXANDER L. STEVAS,
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NO. 83-1868

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOHN E. WHITE,

Appellant

v.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION: R.H. WARREN, Chairman, MORGAN MURPHY; CHARLES L. NESBITT; FRANKLIN U. CROSS; MRS. CALISTA LANGSTAFF; JAMES H. HALL; MRS. LAURA TRIPLETT, Members of the Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Individually and in their official capacities,

Appellees

ON APPEAL FROM THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

APPELLANT'S RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE and SUPPLEMENTAL BRIEF

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DOUGHERTY COUNTY BOARD OF EDUCATION, et al.

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Appellant submits this Response to the Brief of the United States as Amicus Curiae (hereinafter "Brief of U.S.") recently filed and this Supplemental Brief to discuss this Court's recent, intervening Section 5 decision, N.A.A.C.P. v. Hampton County Election Commission, No. 83-1015, 52 U.S.L.W. 4207 (February 27, 1985).

I. THE QUESTION OF SECTION 5 "COVERAGE"

The United States takes the position that Section 5 does not apply to the circumstances of this case. The major premise of the Government's position is that summary affirmance is appropriate because the District Court majority below "concluded that the School Board's present policy is the same as that in effect in 1964." (Brief of U.S. at 16; see also at 14). From this premise, the Government argues that because there was no "change", there can be no "coverage" by Section 5. Because this major premise is false both as a factual and a legal matter, even under an approving view of the opinion below, its conclusion of no Section 5 coverage should be rejected.

The factual status of the Board's policies in November, 1964 regarding

political leaves is not in dispute. Below, Appellees admitted the following Request for Admission: "Prior to May, 1972, the Dougherty County Board of Education had no policy concerning political leave for its employees." (First Request to Admit, No. 9). The adoption of Rule 58 in 1972 was the first action taken by the Board concerning political leaves. Prior to 1972, the Board had no policy on political leaves (whether permitting, denying, or considering requests on a case-by-case basis.) Similarly, it is not disputed that from 1972 until the early part of 1980, the Board permitted political leaves. Finally, it is not disputed that since 1980, no political leaves have been permitted, despite requests.

However the post-April, 1980 era is characterized (whether political leaves are considered on a case-by-case basis,

as argued below by Appellees, and as concluded by the majority, or are not permitted leaves as a matter of formal policy and practice, as argued by Appellant and as accepted by the dissent), either of these characterizations represents a "change" from the situation in 1964. As a factual matter, the Government's equating the post-1980 era with the 1964 benchmark date would be correct only if the Board in 1964 had a policy to consider such leaves on a case-by-case basis. Appellees do not so contend nor did the majority so find. Although the Government demolished the strawman it erected, that demolition is irrelevant to the questions before this Court.

The underlying Section 5 coverage question before this Court is whether, in the complicated and unusual circumstances of this case, the undisputed

change between the absence of any policy (affirmative or negative) in 1964 and the Board's post-April, 1980 conduct is within or without the reach of Section 5. Although the Government's opening argument sheds no useful light on this question, this Court's recent decision in Hampton County does--favorably for Appellant. That decision exposes the legal flaws in the Government's major premise as well as errors of law committed by the majority decision.

The majority opinion below adopted a formalistic approach in deciding whether the undisputed change which has occurred here between 1964 and the post-April, 1980 era constituted a "standard, practice, or procedure" within the meaning of Section 5. The majority drew upon Black's Law Dictionary as its primary legal source for making this determination. (J.S. App. A39-42). (In

contrast, Appellant submits, to the dissent which looked to and applied this Court's extensive Section 5 jurisprudence.) The majority, applying the definitions extracted from Black's, concluded that the change was not a "standard, practice or procedure" but instead represented only individual decisions. In evaluating the undisputed fact that from 1978-1980 the Board permitted Appellant and two other employees to take political leave, the majority concluded:

> A "standard, practice, or procedure" being at the least a precedent on which the affected employees and others may rely, the defendant board put those employees on notice that this decision created no precedent by advising that a two-year effect on job performance study would be conducted and the matter reconsidered at the end of that study. No "standard, practice, or procedure" was thus established. It was nothing more than three individual personnel decisions. (J.S. App. A42)

This Court's decision in Hampton County lays to rest any argument that a formalistic approach is appropriate to determine Section 5's coverage questions. This Court there rejected any reading of Section 5 which would limit its applicability only to formally announced, repetitive policies or actions:

> ...Rather, they argue that because the rescheduling in this case was merely an administrative effort to comply with a statute that had already received clearance, it was not a change of such magnitude as to trigger the requirements of Section 5. But plainly, the form of a change in voting procedures cannot determine whether it is within the scope of Section 5. That section reaches informal as well as formal changes,...Neither is it determinative that an alteration in scheduling is unlikely to be repeated, as it would be if it were embodied in a statute or rule. The Voting Rights Act reaches changes that affect even a single election. 53 U.S.L.W. at 4211 (footnotes omitted).

Hampton County, at a minimum[1], confirms Circuit Judge Anderson's dissenting analysis regarding the coverage question even if the policy were only viewed as "case-by-case." (J.S. App. A63-70), and rejects the rigid, legalistic approach of the majority. Measured against the Black's definition, used by the majority below, Hampton County would have come out contrary to the result reached by this Court in that decision.

Hampton County's rejection of a

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[1]Judge Anderson also concluded that the Board's post-April, 1980 actions clearly established that the Board had a clear policy of prohibiting all political leaves, and that such a policy represented a covered change. (J.S. App. A57-63). His dissent pointed out that the majority's resolution of this question to the contrary was "ambiguous." (J.S. App. A57, n.3). This characterization is generous. The Government's Brief struggles with the obvious inconsistencies of the majority's analysis in two separate footnotes. See Brief for U.S. at 12, n. 8; at 13, n.9.

formalistic approach to Section 5 analysis undermines another aspect of the majority's legal analysis. In declining to follow the approach of N.A.A.C.P. v. State of Georgia, 494 F. Supp. 934 (N.D. Ga. 1981) (three judge)[2/], the majority stated that it failed "to perceive how a negative decision can create a 'standard practice or procedure' for anything." (J.S. App. A45)[3/] Hampton County teaches that proper Section 5 analysis is not a

2/ The majority correctly read this voting rights decision as contrary to its own interpretation of Section 5. The United Staes, while citing this decision of the Northern District of Georgia, misreads it. (Brief of U.S. at 8., n.4). N.A.A.C.P. v. State of Georgia, while in direct support of Appellant's position, does not support the Government's proposition regarding changes back from precleared changes because none of the convoluted actions involved in that litigation had been precleared.

3/ The Government's Brief applies a similar formalistic approach: "Not adopting a special policy permitting political leaves is quite a different matter from adopting a special policy against granting political leaves." Brief of U.S. at 13, n.8.

question of labels but is a matter of looking to determine whether there has in fact been any change since 1964 that has not been precleared. Because on the facts here, there has been such a change, Section 5 coverage extends to the facts of this case.[4/]

Rather ironically, the Government asks this Court to summarily affirm even though it concedes[5/] that for at least the period between 1972 and 1982, Appellees unlawfully implemented Section 5

[4/] Appellant would agree that if, in 1964, the Board had had a specific policy prohibiting political leaves and that in 1980 it reconsidered this policy but declined to make a change, that "negative" decision would not fall within Section 5's reach. Such facts are not, however, presented here.

[5/] There is of course no dispute that Rule 58 was improperly implemented for the period of time between 1972-1977. The Brief of the Government also concedes that the leaves permitted between 1977 and 1980 could have been subject to preclearance:

(footnote continued on next page)

changes without seeking the necessary compliance. The very footnote 19 of Justice White's opinion cited by the Government, when read in its entirety, summarizes the continuing recalcitrance of covered jurisdictions to comply with Section 5. To cite footnote 19 in support of the judgment below, as the Government's Brief does, seems to stand that footnote on its head.[6/] Appellant readily acknowledges that the facts in this case are complicated. But, as in

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But even if the individual grant of leave had constituted a "standard, practice, or procedure," it was not precleared and thus must be considered a legal nullity. NAACP v. Hampton County Election Comm'n, No. 83-1015 (Feb. 27, 1985), slip op. 8 n.19; Conner v. Waller, supra. (Brief of U.S. at 12).

[6/] Except for this use of footnote 19 out of its context, the Government's Brief is notable for the failure to cite Hampton County anywhere else.

Hampton County, any dilemmas faced by the Board are "largely of their own making." 53 U.S.L.W. at 4210.

In sum, this Court's Hampton County decision ratifies Circuit Judge Anderson's analysis in every respect. Conversely, that decision is fundamentally at odds with the majority's conclusion that the change between 1964 and post-April, 1980 was not a "change" within the meaning of Section 5.

II. THE "WITH RESPECT TO VOTING" QUESTION

Although the majority did not reach the question of whether the challenged practices were "with respect to voting," the Government argues to this Court that they were not. (Brief of the U.S. at 17-8). Judge Anderson below did reach this question (J.S. App. A71, n.8) and concluded that "The barrier

here, i.e., precluding leave altogether, is as significant as that involved in the previous case, i.e., presenting a financial disincentive to candidacy by requiring leave during the campaign." (J.S. App. A71, n.8). Judge Anderson also cited and relied upon the Attorney General's regulations, 28 C.F.R. 51.12(g), which state that "changes affecting voting" include any changes affecting the ability of anyone to "become or remain holders of elective offices." (J.S. App. A72).

The Brief of the United States conspicuously does not even cite this regulation of the Attorney General, must less offer any response to Judge Anderson's reliance thereon. (Compare the Government's repudiation of the Attorney General's thrice-repeated request to Appellees to submit before implementation any of the changes commencing with

the April, 1980 Board action. (J.S. App. A16, n.11) Appellant respectfully submits that when Judge Anderson's arguments on this issue are compared with those of the Government, Judge Anderson holds the prevailing views.

III. CONCLUSION

Appellant fully appreciates that his appeal stands before this Court with the doubly vexatious problems of having been unsuccessful in the District Court below and having the formal opposition of the United States here. Notwithstanding these substantial burdens, Appellant adheres to the view that proposing summary reversal of the judgment below is neither naive nor presumptuous. Circuit Court Judge Anderson's thorough dissent, grounded in the proper application of Section 5 principles to the facts of

this case, has now had added to it the support of this Court's most recent decision in the area, Hampton County. Summary reversal is, under the circumstances, warranted. Naturally, if Appellant fails to persuade this Court that summary reversal is the proper disposition, he urges that the Court note probable jurisdiction to allow plenary review.

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CERTIFICATE OF SERVICE

I, JOHN R. MYER, counsel of record for Appellant and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, I have served three (3) copies of the foregoing on

Jesse W. Walters, Esq.,
Post Office Box 527
Albany, Georgia 31707

Counsel for Appellees

and

Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

by depositing same in the United States mail, first class postage prepaid and addressed as above.

This 18th day of March, 1985.

S/JOHN R. MYER

JOHN R. MYER